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Supreme Court, U.S.
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No. 98-1493

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

TED HERRING, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Herring states the Questions Presented in the following way:

1. Whether the Florida Supreme Court -- in conflict with the United States Court of Appeals for the Second, Third, Fourth, and District of Columbia Circuits -- erred in excluding evidence of trial performance in determining whether a death penalty defendant's attorney "actively represented conflicting interests" within the meaning of this Court's decision in *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980).

2. Whether the Florida Supreme Court correctly held -- in direct conflict with this Court's decisions in *Clemons v. Mississippi,* 494 U.S. 738 (1990) and *Sochor v. Florida,* 504 U.S. 527 (1992) -- that it could vacate an aggravating circumstance and impose the death penalty without either reweighing or conducting a harmless error analysis.

Respondent restates the Questions Presented in the following way:

1. Whether this Court should exercise its certiorari jurisdiction to review the decision of the Florida Supreme Court when that decision does not conflict with the decision of any Federal court, when the issue was correctly decided by the State Court, and when the issue contained in the petition presents only factual questions which are inappropriate for certiorari review?

2. Whether this Court should exercise its certiorari jurisdiction to review an issue that has never been presented to the State Courts, that is untimely raised, and is not of sufficient importance to justify certiorari review?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent State of Florida respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Supreme Court's May 2, 1991, and September 24, 1998 opinions denying Herring's various motions for post-conviction relief. Those opinions appear in Herring's *Appendix* at A-35 and A-24, respectively.

JURISDICTION

Herring asserts that jurisdiction exists pursuant to 28 U.S.C. § 1257, and states that he seeks certiorari "to review two decisions of the Florida Supreme Court pursuant to this Court's Rule 12.4." *Petition*, at 2. Those decisions were entered more than seven years apart, and the State of Florida does not concede that the petition is timely with respect to the May 2, 1991, judgment. Moreover, that judgment does not involve "identical or closely related questions" with respect to

the September 24, 1998, judgment as required by Supreme Court Rule 12.4 for the presentation of a single petition for writ of certiorari respecting multiple judgments.

The petition for certiorari with respect to the September 24, 1998, decision of the Florida Supreme Court appears to be timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Herring asserts that the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are involved in the issues contained in this petition.

STATEMENT OF THE CASE

The "Statement of the Case" set out at pages 2-10 of Herring's petition is argumentative, and, for that reason, is not accepted by the Respondent State of Florida. The State relies upon the following statement of the case, which is based upon the facts found by the Florida Supreme Court in connection with its disposition of the various matters Herring has brought before that Court.

The Direct Appeal Facts

On direct appeal to the Florida Supreme Court, that Court summarized the facts giving rise to Herring's conviction and death sentence in the following way:

> Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper

distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his Miranda rights. Herring signed a written waiver of his Miranda rights and was interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies

was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk

once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's.

At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the

testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Pet. App., at 10-13. This Court denied certiorari on November 11, 1984. *Herring v. Florida,* 469 U.S. 989 (1984).

The Collateral Attack Proceedings

In its 1998 decision, the Florida Supreme Court summarized the collateral attack history of Herring's case as follows:

> This Court affirmed Herring's convictions and death sentence in *Herring v. State*, 446 So.2d 1049 (Fla. 1984), but subsequently struck down the application of the CCP aggravator. *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987). We rejected a motion to vacate Herring's death sentence that was predicated on our decision to recede from the application of the CCP aggravator. *Herring v. State,* 580 So.2d 135 (Fla. 1991).
>
> In his first rule 3.850 motion, Herring raised an ineffective-assistance-of-counsel claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The trial judge denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla. 1986). (FN1) Herring filed a second rule 3.850 motion and claimed, among other things, that he received ineffective assistance of counsel due to a conflict of interest between Pearl's status as a special deputy sheriff and Pearl's responsibilities owed to Herring. (FN2) The trial judge denied the motion, but this Court remanded the ineffectiveness issue for an evidentiary hearing. *Herring v. State*, 580 So.2d 135 (Fla. 1991). Herring's hearing was consolidated with the hearings of eight other defendants who had raised similar "Howard

Pearl claims." (FN3) The judge held that none of the defendants were adversely affected by Pearl's special deputy status. However, in *Teffeteller v. Dugger (Herring v. State)*, 676 So.2d 369 (Fla. 1996), this Court remanded four of the cases, including Herring's case, for individual evidentiary hearings solely on Pearl's status as a special deputy sheriff. As directed by this Court, a second evidentiary hearing was held, and Herring's motion was again denied.

> FN1. Of the denial of Herring's first rule 3.850 motion, we wrote, "The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla. 1981). We fully agree with the trial judge's findings and commend him for his detailed explanation." *Herring*, 501 So.2d at 1280.

> FN2. In a separate case we held that Pearl's special deputy sheriff status was not a per se conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla. 1990).

> FN3. The other defendants were Robert Teffeteller, Kenneth Quince, Robert Henderson, Gerald Stano, Joel Wright, Johnny Robinson, Felix Castro, and Richard Randolph.

Pet. App., at A-36-37.[1]

REASONS FOR DENYING THE WRIT

I. THE CONFLICT OF INTEREST ISSUE

The first question contained within the petition concerns Herring's claim that the decision of the Florida Supreme Court on the conflict of interest claim "directly conflicts with decisions of numerous other courts and demonstrates uncertainty in the lower courts in the application of *Cuyler v. Sullivan*". *Petition*, at 13. For the reasons set out below, the

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[1] Herring also filed a federal habeas corpus petition. The Florida Supreme Court described that litigation as follows:

> In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion under rule 3.850, asserting that our decision in *Rogers* was a change in the law.

Pet. App., at A-27.

opinion of the Florida Supreme Court is a correct application of this Court's *Cuyler* decision, does not conflict with any other decision, and does not present an appropriate case for the exercise of this Court's certioriari jurisdiction.

The State trial court conducted an evidentiary hearing on the conflict of interest issue, and made the following findings of fact:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family." * The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm.... Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.
>
> Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff....
>
> Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly

constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and [was] never given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at

present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm.... Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

....

Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no

> evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.
>
> > *At the time Mr. Pearl sought to carry a concealed firearm there were no provisions for the sanctioning of private individuals to carry concealed weapons throughout the State of Florida.

Pet. App. A-39-42. The Florida Supreme Court quoted those facts in its opinion, and affirmed the denial of relief. *Pet. App.* A-42-43. That detailed discussion of the facts and the applicable law clearly demonstrates that the Florida Supreme Court decided this issue in accord with *Cuyler v. Sullivan.* Because the issue was correctly decided by the State Court, there is no basis for certiorari review.

Herring's Petition implies that the Florida Supreme Court did not consider the "performance" of his trial attorney in decided the conflict issue, and tacitly suggests that such performance has never been considered by any state court. The true facts are that Herring has already lost on his claims of ineffective assistance of counsel, and received the proceeding under review herein only because of the peculiar circumstances of his conflict of interest claim. *App.* at A-17-20.

Herring identifies four cases which, according to him, conflict with the decision of the Florida Supreme Court. When those decisions are considered in their entirety, instead of being

read out-of-context, they stand for the wholly unremarkable proposition that *Cuyler v. Sullivan* requires a defendant seeking relief based upon an alleged conflict of interest to "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). That is a two-part standard, and none of the "conflicting" cases relied upon by Herring allow the defendant to escape the burden of proving not only an actual conflict, but also an "adverse effect" as a result thereof. For example, *United States ex rel. Duncan v. O'Leary*, 806 F.2d 1307, 1315 (7th Cir. 1986), decided the actual conflict component first, and then decided the "adverse effect" issue. That disposition is in accord with the Florida Supreme Court's decision in this case -- that Court found that there was no actual conflict and that there was therefore no need to address the adverse effect component of *Cuyler*. Likewise, *United States v. Tatum*[2], *United States v. Taylor*[3], *Strouse v. Leonardo*[4], and *Government of Virgin Islands v. Zepp*[5] do not stand for the proposition advanced by Herring. Those cases recognize that *Cuyler* established a two-part test, and that the defendant must meet both components before he is entitled to relief. None of the cases relied upon by Herring to establish a conflict of decisions compels a result other than the one reached by the Florida Supreme Court. There is no conflict between the Florida Supreme Court and any of the Federal Appeals Courts, and there is no basis for the exercise of this Court's certiorari jurisdiction. Herring's petition should be denied.

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[2] 943 F.2d 370 (4th Cir. 1991).

[3] 139 F.3d 924 (D.C. Cir. 1998).

[4] 928 F.2d 548 (2d Cir. 1991).

[5] 748 F.2d 125 (3d Cir. 1984).

This Court should also decline to exercise its certiorari jurisdiction in this case because the only issue presented is a question of fact which is inappropriate for certiorari review. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955); *Grayson v. Harris,* 267 U.S. 352, 358 (1925). In order to decide this case, this Court would be compelled to review the evidence and discuss specific facts. Under long-standing law, that is not the function of certiorari review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). This Court should not exercise its certiorari jurisdiction in this case.

II. THE AGGRAVATING CIRCUMSTANCE ISSUE

The second question presented in the petition concerns the Florida Supreme Court's 1991 decision in Herring's case with respect to the cold, calculated, and premeditated aggravating circumstance. In pertinent part, the Florida Supreme Court's opinion reads as follows:

> With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and

premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find

> that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

Pet. App., at A-30-31. This Court should decline to exercise its certiorari jurisdiction over this claim for the following reasons.

The claim contained in Herring's petition is predicated on *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Sochor v. Florida*, 504 U.S. 527 (1992). However, that claim was never raised before the State Courts, and, in fact, Herring argued on appeal to the Florida Supreme Court in 1990 that he was entitled to relief on **State law grounds.**[6] The federal question contained in the petition was not decided by the Florida Supreme Court, which decided the state law claim on state law grounds. *Herring, supra.* Herring made no effort to raise the federal claim contained in the petition before any Florida court, and, for that reason, certiorari review is inappropriate. *Allen v. McCurry,* 449 U.S. 90, 105 (1980); *Beck v. Washington,* 369 U.S. 541 (1962); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).[7]

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[6] The pertinent portions of Herring's brief to the Florida Supreme Court appear at *Apppendix* A-1-16.

[7] A *Clemons*-based claim was arguably contained in Herring's motion for rehearing before the Florida Supreme Court. However, a motion for rehearing is insufficient to present a federal question to the state courts. *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

This Court should also decline to exercise its certiorari jurisdiction in this case because, assuming *arguendo* that there is federal question presented, the petition is untimely. The judgment of the Florida Supreme Court at issue in the second part of the petition was rendered on May 2, 1991, and rehearing was denied by that Court on June 12, 1991. *Herring v. State,* 580 So.2d 135 (Fla. 1991). The State Court judgment was final at that time for all purposes, including seeking review before this Court. Under any interpretation of this Court's rules, the time for filing a petition for writ of certiorari respecting that decision expired eight years ago. *See, e.g., Cox Broadcasting Corp. v. Cox,* 420 U.S. 469, 482-83 (1975). The present petition is untimely and should be denied. To the extent that Herring relies on *Reece v. Georgia,* 350 U.S. 85, 86-87 (1955), for the proposition that his petition for certiorari review is timely, *Reece* is inapposite to the situation present in this case. *Reece* presented a bizarre factual situation that is not present in this case, and does not establish that Herring's petition is timely.

Moreover, the Florida Supreme Court made an express and detailed finding of harmless error that comports with this Court's *Sochor v. Florida* decision. That disposition is correct, and there is nothing more that the State Courts can or should do.

Finally, the petition should be denied because the question presented therein is not of sufficient importance to justify the exercise of this Court's certiorari jurisdiction. The true facts are that the issue is of no interest to anyone other than the parties to this litigation. The narrow issue contained in the petition has no significance outside of this case, and this Court

should decline to exercise its certiorari jurisdiction. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

CONCLUSION

For the reasons set out above, Respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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ARGUMENT

I.

THE ERRONEOUS APPLICATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE REQUIRES VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation of The Eighth And Fourteenth Amendments

Herring I has now been explicitly overruled by *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L.Ed.2d 681, 108 S.Ct. 733 (1988) ("Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question."); *see Herring III*, 528 So.2d at 1178 ("Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*.") (citations omitted). *Rogers* and *Herring III* confirm that Herring is now entitled to relief on the merits of this claim.

1. The Application Of The Heightened Premeditation Aggravating Circumstance To The Facts Of This Case Was An Aberration in Florida Capital Jurisprudence.

The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> [t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla.Stat.Ann. §921.141(5)(I) (West Supp. 1984) (the "heightened premeditation aggravating circumstance").

At the time Herring was sentenced to death, Florida case law clearly defined the scope of this aggravating circumstance. It was restricted to circumstances in which the degree of premeditation is shown to be greater than that necessary to establish premeditation for conviction in the guilt/innocence phase of a capital felony trial. *See Preston v. State*, 444 So.2d 939 (Fla. 1984) (citing cases). It applies only to cases in which "the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and though by the perpetrator." *Id.* At 946. Consequently, "[p]roof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction." *Maxwell v. State*, 432 So.2d 967, 971 (Fla. 1983); *accord Washington v. State*, 432 So.2d 44, 48 (Fla. 1983) ("[t]his aggravating circumstance inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation"); *Combs v. State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 72 L.Ed.2d 862, 102 S.Ct. 2258 (1982).

In this case, there was no evidence of a preconceived plan to commit a murder. Nor does the record contain any evidence of "a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." *Preston*, 444 So.2d at 946. On the contrary, the homicide here was a spontaneous event

which occurred quickly and thoughtlessly. Nothing in this case suggests premeditation, heightened or otherwise. Herring undertook to rob a convenience store, as he had done on prior occasions. In his confession, the product of eight hours of interrogation by the police, he stated that the clerk's sudden movement caused him to panic and fire his gun. He stated that he shot the clerk "by mistake," "out of fear," and in response to what he perceived to be a threatening movement by the clerk. R.O.A. at 10-11; *cf. Cannady v. State*, 427 So.2d 723, 730 (Fla. 1983) ("[t]hese statements establish that [the defendant] had at least a pretense of a moral or legal justification, protecting his own life"). The State offered no evidence that contradicted Herring's version of the shooting. There is thus no evidence of reflection. The evidence demonstrates that the gun was fired reflexively, as a spontaneous reaction rather than a planned act.

Moreover, there was no evidence that the homicide was preconceived. In fact, the record shows that the contrary was the case. In confessing to the crime for which he was sentenced to death, Herring also confessed to four other armed robberies in which no one was hurt and his gun was never fired. This refusal to use his gun in these other cases demonstrates forcefully that he had no intention of using it in the present case, and that he did so only as a responsive act.

The heightened premeditation aggravating circumstance has been held inapplicable to cases in which the evidence established that the victim was killed "intentionally and deliberately," but nothing more. *Maxwell*, 443 So.2d at 971. Rather, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders." *McCray v. State*, 416 So.2d 804, 807 (Fla. 1982). Although this Court in *McCray* also observed that "that description is not intended to be all-inclusive," *Id.*, nothing in

any case construing Section 921.141(5)(I) -- save one, *Herring I* -- suggests that this aggravating circumstance is applicable to any capital felony case unless there is substantial evidence that the killer first devised a plan to commit the murder and thereafter put that plan into effect.

Numerous cases construing Section 921.141(5)(I) prior and subsequent to Herring's direct appeal have rejected the applicability of this aggravating circumstance to facts which show far more "lengthy, methodic or involved . . . atrocious events" and in which thee was a far more "substantial period of reflection and thought by the perpetrator" than was established here. *See, e.g., Preston*, 444 So.2d at 945 (heightened premeditation aggravating circumstance held inapplicable where, after robbing a convenience store, the murderer kidnapped the store clerk, forced her to walk a mile and a half at knifepoint, after which the murderer cut the clerk's throat "by severing the jugular veins, trachea and main arteries of the neck," stabbed the victim numerous times about her body, and cut a cross mark into her forehead); *White v. State*, 446 So.2d 1031 (Fla. 1984) (heightened premeditation aggravating circumstance held inapplicable where the evidence established that defendant had robbed a convenience store, in the course of which he shot and killed a customer; shot the store clerk twice, paralyzing him permanently from the neck down; and attempted to shoot two other persons who came into the store); *Blanco v. State*, 452 So.2d 520, 526 (Fla. 1984), *cert. denied*, 469 U.S. 1181, 83 L.Ed.2d 953, 105 S.Ct. 940 (1985) (although defendant, while committing a burglary, shot the victim six times after the victim had fallen from his first shot, Florida Supreme Court concluded "there was no showing of heightened premeditation beyond a reasonable doubt necessary to the proper application of this factor"); *Hamblen v. State*, 527 So.2d 800, 805 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where "the evidence [did] not

indicate that [the defendant] had a conscious intention of killing [the victim] when he decided" to commit the robbery); *Garron v. State*, 528 So.2d 353 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where killing of stepdaughter appeared to have been a "spontaneous reaction").[1] The decision reached in Herring's direct appeal was, and remains, a solitary aberration in the construction of the heightened premeditation aggravating circumstance.

A noteworthy example of how the Florida courts have, with the sole exception of *Herring I*, consistently applied the

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[1] *See also McCray*, 416 So.2d at 805 (heightened premeditation aggravating circumstance held inapplicable where themurderer first stole several boxes of rifles from the victim's van, and later, after taking them to the edge of a wooded area, returned to the victim's van where the killer yelled, "This is for you, you motherfucker," and shot the victim three times in the abdomen); *Cannady*, 427 So.2d at 730 (heightened premeditation aggravating circumstance held inapplicable where the killer first abducted a hotel employee and later shot victim five times, killing him); *King v. State*, 436 So.2d 50 (Fla. 1983), *cert. Denied,* 466 U.S. 909, 80 L.Ed.2d 163, 104 S.Ct. 1690 (1984) (heightened premeditation aggravating circumstance held inapplicable where the victim had first been struck on the head with a blunt instrument by her roommate, who thereafter shot her in the head); *Peavey v. State*, 442 So.2d 200 (Fla. 1983) (heightened premeditation aggravating circumstance held inapplicable where the elderly victim was stabbed several times and his apartment was ransacked by defendant, who sprayed shaving cream on the door lock to avoid detection and had, prior to the murder, accompanied the victim into his apartment by helping him with his groceries); *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 80 L.Ed.2d 563, 104 S.Ct. 2181 (1984) (heightened premeditation aggravating circumstance held inapplicable where evidence revealed that the victim, a 73-year-old woman, was killed after she fought long and hard for her life); *Drake v. State*, 441 So.2d 1079 (Fla. 1983), *cert. denied*, 466 U.S. 978, 80 L.Ed.2d 832, 104 S.Ct. 2361 (1984) (heightened premeditation aggravating circumstance held inapplicable in spite of evidence that the victim was first kidnapped; later raped, using her bra to tie her hands behind her back; and finally killed, being stabbed repeatedly in the lower chest and abdomen).

heightened premeditation aggravating circumstance can be found in *Caruthers v. State*, 465 So.2d 496 (Fla. 1985), a case decided one year after *Herring I*. In *Caruthers*, this Court reversed a death sentence and instructed the trial court to impose a life sentence on the basis of a factual record virtually identical to the record here. The material facts of *Caruthers* were that (1) a convenience store clerk, who had known the accused, was found dead behind the store counter, with the cash register open, and (2) after his arrest, the accused confessed to the robbery and homicide, claiming that he shot the clerk three times after the clerk made a sudden movement. 465 So.2d at 497-98. Finding that the operative facts failed to establish "a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder," this Court concluded that the imposition of the death penalty was disproportionate. *Id.* At 498-99.

This Court vacated Caruthers' death sentence based, in part, upon a finding that two aggravating circumstances were erroneously applied. Both of these same aggravating circumstances form the basis for Herring's sentence Yet, despite the startling similarities between *Caruthers* and *Herring*, this Court reached a totally inconsistent conclusion on direct appeal in Herring's case. The only meaningful differences between the present case and *Caruthers* weigh in Herring's favor: Herring had never met the store clerk before, unlike Caruthers, who was known to his victim; and the clerk was shot twice in *Herring*, three times in *Caruthers*. If the Florida death penalty statute can permit two diametrically opposite results to flow from the same set of facts, then that statute surely is being applied in an arbitrary and capricious fashion.

On direct appeal in this case, this Court affirmed the trial court's ruling as to the applicability of this aggravating

circumstance. *Herring I*, 446 So.2d at 1057. Justice Ehrlich dissented from this finding, stating:

> We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(I), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Id. At 1058 (Ehrlich, J., concurring in part, dissenting in part) (emphasis supplied).

Justice Ehrlich's analysis of the inapplicability of this aggravating circumstance to Herring's case was correct, as this Court acknowledged in *Rogers*:

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which bear the indicia of "calculation". Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in *Herring v. Stat*, 446 So.2d 1049, 1057 (Fla.), *cert. Denied*, 469 U.S. 989 (1984), to the extent it dealt with this question.

511 So.2d at 533 (emphasis supplied).

Herring's death sentence is unique under Florida's capital sentencing statute, and as a consequence, Herring is in a class of one on death row in Florida. In no case, either before Herring's or since, has this aggravating circumstance been applied under facts remotely resembling the facts of this case, and this Court has held it erroneous to do so.

2. The Application Of The Heightened Premeditation Aggravating Circumstance Is An Error Of Constitutional Dimension

While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982).

Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47, 96 S.Ct. At 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Maynard v. Cartwright*, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988) (citing *Godfrey*, 446 U.S. at 429, 100 S.Ct. At 1765).

In *Cartwright*, 486 U.S. at 356, t he Court unanimously affirmed the vacatur of a death sentence based on the erroneous application of a statutory aggravating circumstance. Relying on *Godfrey*, t he Court concluded that the Oklahoma Court of Criminal Appeals had "failed to apply its previously recognized limiting construction of the aggravating circumstance," and that, as a result, "there was 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Cartwright*, 486 U.S. at 363, 108 S.Ct. At 1859 (quoting *Godfrey*, 446 U.S. at 433, 100 S.Ct. At 1767). The Court concluded that the application of the aggravating circumstance to the facts of *Cartwright* "without some narrowing principle to apply to those facts" violated the Eighth Amendment. *Id.*

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. Denied*, 464 U.S. 1002, 78 L.Ed.2d 697, 104 S.Ct. 508 (1983), the Eleventh Circuit vacated a death sentence on the basis of, among to her things, the erroneous application of Florida's "heinous, atrocious, and cruel" aggravating circumstance, as well as the state's "risk of death to many persons" aggravating factor. Relying on *Godfrey*, the court held that "[a]pplication of [these] aggravating factor[s] to the facts of this case is not only inconsistent with the Florida Supreme Court's construction of the provision[s]; it also reflects an absence of control or guidance of the sentencing judge's discretion." 685 F.2d at 1265-66. The court concluded that the erroneous application of the statutory aggravating circumstances "suggests no 'inherent restraint on the arbitrary and capricious infliction of the death sentence,'" and therefore violated the Eighth Amendment. *Id.* at 1264-65 (quoting *Godfrey*, 446 U.S. at 428, 100 S.Ct. At 1764).

As the Eleventh Circuit later explained in *Hargrave v. Wainwright*, 804 F.2d 1182, 1194 (11th Cir.), *rehearing en banc granted and vacated on other grounds*, 809 F.2d 1486 (11th Cir. 1986):

> In sum, the state reviewing courts in both *Proffitt* and *Godfrey* failed to give any explanation or set forth any facts upon which the courts justified their findings of the particular aggravating circumstance under review. Moreover, upon an independent examination of the record, neither this circuit in *Proffitt* nor the Supreme Court in *Godfrey* could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstance to apply.

Id. (Emphasis supplied). This rationale applies with particular force to the present case.

3. Herring Is Entitled To A New Sentencing Hearing.

As a matter of Florida law, Herring is entitled to a new sentencing hearing. As the United States Supreme Court has recognized, under Florida law, "[i]f the trial court found that some mitigating circumstances exist . . . a "defendant must be resentenced when [the] trial court[] erroneously consider[s] improper aggravating factors." *Barclay v. Florida*, 463 U.S. 939, 954-55, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983). Under such cicumstances, a resentencing is required because

> the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y

> number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Elledge v. State, 346 So.2d 998, 1003 (1977) (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L.Ed.2d 295, 94 S.Ct. 1950 (1974)); *see also Elledge, Id.* ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); *accord Barclay*, 463 U.S. at 963, 103 S.Ct. At 3431-32 (Stevens, J., concurring); *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986) (defendant "entitled to new sentencing hearing in order to satisfy the constitutional safeguards for sentencing in death penalty cases" where trial court erroneously rejected two mitigating circumstances during sentencing phase). Herring's death sentence has therefore been irremediably infected by the erroneous application of the heightened premeditation aggravating circumstance.

B. The Trial Court Committed Clear Error In Summarily Dismissing Herring's *Rogers* Claim.

In summarily dismissing Herring's *Rogers* claim, the trial court simply accepted the State's arguments that this Court's decision in *Eutzy v. State*, 541 So.2d 1143 (Fla. 1989), effectively foreclosed the relief Herring seeks, and that, in any event, Herring's *Rogers* claim was "procedurally defaulted in that it [was] untimely presented in violation" of Rule 3.850. R.O.A. at 100-01. In so holding, the trial court failed to address the constitutional significance of the *Rogers* decision as

applied to Herring, misread this Court's decision in *Eutzy*, and accepted arguments proffered by the State in plain violation of the very procedural default rules -- which apply with equal force to the State -- cited by the trial court in disposing of Herring's claim.

1. The Trial Court Misread *Eutzy* As Foreclosing Herring's *Rogers* Claim; In Fact, *Eutzy* Confirms That Herring Is Now Entitled To Relief.

In its Order summarily dismissing Herring's *Rogers* claim, the trial court did not consider the aberrational nature of the application of the heightened premeditation aggravating circumstance to the facts of Herring's case; it did not consider the numerous indistinguishable cases in which that circumstance was held to be inapplicable; it did not analyze the effect of the *Rogers* holding overruling *Herring I* as applied to Herring himself; it did not even mention the binding United States Supreme Court precedent, including *Cartwright* and *Godfrey*, on point. Instead, the court below merely accepted the State's argument that Herring was not entitled to a benefit of the *Rogers* decision in light of this Court's opinion in *Eutzy*, holding that the "decision in *Rogers* . . ., restricting the applicability of the cold, calculated, and premeditated aggravating factor was not a fundamental change in the law 'should be given retroactive effect' but was a mere 'evolutionary refinement' in the law which should not be utilized to abridge the finality of judgments." R.O.A. at 100-01 (quoting *Eutzy*, 541 So.2d at 1147) (emphasis in original). This holding reflects the trial court's misapprehension of Herring's *Rogers* claim and its misreading of *Eutzy* as dispositive.

In essence, Herring argued below, as he does here, that his death sentence was an aberration in Florida capital

jurisprudence; that is, *Herring I* was a mistake at the time it was decided. The *Rogers* decision, which "expressly overruled the application of [the heightened premeditation] aggravating circumstance under the factual situation set forth in *Herring [I]*," *Herring III*, 528 So.2d at 1178, thus confirmed the aberrational nature of Herring's death sentence.[2] As such, the critical issue before the trial court was not whether *Rogers* applied retroactively to Herring, but rather, whether Herring could remain under a sentence of death imposed on the basis of a statutory aggravating circumstance wrongly applied -- as *Rogers* confirmed -- in the first instance *Eutzy* did not address this question.[3]

Indeed, this Court's decision in *Eutzy* does nothing to diminish Herring's claim that his death sentence is an

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[2] The State argued below that "*Rogers* does not specifically invalidate the cold, calculated, and premeditated murder aggravating factor found established in this case." R.O.A. at 49. This argument obviously is incorrect in light of this Court's unequivocal statement in *Herring III*. It also is contrary to the position taken by the State in federal court: "[B]y virtue of the decision in *Rogers* [citation omitted], one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case." R.O.A. at 41. For reasons discussed more fully in Section I.B.2., *infra*, the State should be barred from denying the validity of Herring's *Rogers* claim.

[3] In his Rule 3.850 motion, Herring argued, in t he alternative, that if *Herring I* was not an aberration, then *Rogers* must be viewed as a fundamental change in Florida law warranting retroactive application. R.O.A. at 15-33. The *Eutzy* Court did not address this alternative question presented in Herring's motion; namely, whether Herring himself -- as opposed to an entire class of capital defendants -- is entitled to retroactive relief in light of this Court's acknowledgment in *Rogers* of the erroneous application of the heightened premeditation aggravating circumstance in *Herring I*. Therefore, Herring maintains that if the decision in *Herring I* was not an aberration, then he, and he alone, is entitled to the retroactive benefit of *Rogers*.

aberration; if anything, *Eutzy* supports Herring's position. In holding that *Rogers* was not a "jurisprudential upheaval" requiring retroactive application to *Eutzy*, 541 So.2d at 1147, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed. Rather, *Rogers* was merely an "evolutionary refinement"in a body of law that had been applied consistently -- with the exception of this case -- since well before the decision in *Herring I*. Under these circumstances, Supreme Court decisions such as *Cartwright* and *Godfrey*, among others, make clear that Herring's death sentence violates the Eighth and Fourteenth Amendments. The trial court's misapprehension of Herring's claim and misreading of *Eutzy* are more than sufficient grounds for reversal.

2. The Trial Court Erred In Failing To Hold The State Procedurally Barred From denying The Validity Or Timeliness Of Herring's *Rogers* Claim.

As noted above, the trial court summarily denied Herring's Rule 3.850 motion "for the reasons set forth in the State's . . . Motion to Strike." R.O.A. at 100. These "reasons" included the State's procedural default argument and its misreading of the *Eutzy* decision. Yet, when the State moved to dismiss Herring's Federal Petition, it argued that (I) the heightened premeditation aggravating circumstance "would seem to have been eliminated in this case;" (ii) Herring "failed to exhaust his available state court remedies" by "never specifically present [ing] to <u>any</u> state court his [Rogers] argument;" and (iii) Herring "could file another Rule 3.850 motion under the authority of *Witt v. State*, 387 So.2d 922 (Fla. 1980) and *Witt v. State*, 465 So.2d 510 (Fla. 1985)." R.O.A. at 41-42.

In short, the State successfully obtained a dismissal of Herring's Federal Petition on the basis of these arguments, then argued below that Herring's current Rule 3.850 motion lacked merit and, in nay event, was time-barred. The State cannot have it both ways. Having invited Herring to litigate his *Rogers* claim in the Florida courts, the State waived its ability to deny the timeliness of Herring's current Rule 3.850 motion or the validity of Herring's claim that his death sentence was an aberration.[4] Under these circumstances, the trial court was obligated, at a minimum, to find Herring's Rule 3.850 motion timely filed, whether because the State was estopped by its conduct in federal court from asserting such a defense.

"Waiver of claims is not a principle that works only to the detriment of petitioners." *Smith v. Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989) (*en banc*) (Kravitch, J., concurring in part and dissenting in part); *see generally Granberry v. Greer*, 481 U.S. 129, 134, 95 L.Ed.2d 119, 107 S.Ct. 1671 (1987) (declining "to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding [a procedural] defense in reserve for use on appeal if necessary"); *Murray v. Carrier*, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986); *Smith v. Murray*, 477 U.S. 527, 91 L.Ed.2d 434, 106 S.Ct. 2661 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). Where, as here, "[t]he state selected its defenses and its arguments . . . it must accept the ramifications

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[4] Of course, the State was free to argue that the *Eutzy* decision foreclosed retroactive application of *Rogers* to Herring, and did so. However, the State was barred from taking contradictory positions in federal and state court with respect the propriety of applying the heightened premeditation aggravating circumstance to the facts of this case, as it also did. *See* n. at 25, *infra*.

of those choices." *Smith v. Zant*, 887 F.2d at 1438 (Kravitch, J., concurring in part and dissenting in part).

In this case, the State should be held to have waived any time-bar objection to Herring's *Rogers* claim in light of the exhaustion defense it asserted in response to Herring's Federal Petition. Indeed, the State affirmatively represented in its motion to dismiss the Federal Petition that Herring's claim was not time-barred. The trial court's failure to acknowledge and enforce the State's waiver was clearly erroneous.

SUPREME COURT OF FLORIDA

Ted HERRING, Appellant,

v. No. 67,524

STATE of Florida, Appellee.

Dec. 30, 1986.

Rehearing Denied March 2, 1987.

Defendant, who had been convicted and sentenced to death for robbing and killing convenience store clerk, moved for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied the motion. Defendant appealed. The Supreme Court held that: (1) defendant's arguments were not proper for postconviction relief motion, and (2) death sentence was proportionate to crime.

Affirmed.

Jeremy G. Epstein, Dennis P. Orr, Kenneth A. Freeling and James P. Bodovitz of Shearman & Sterling, New York City, for appellant.

Jim Smith, Atty. Gen. and Ellen D. Phillips, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals a trial court's denial of his motion for post-conviction relief without an evidentiary hearing under the provisions of Florida Rule of Criminal Procedure 3.850. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

Herring was convicted and sentenced to death for robbing and killing a convenience store clerk. The evidence reflected that Herring shot the clerk once when he perceived a threatening move, and then shot the clerk again "when he hit the ground." This Court affirmed Herring's conviction and sentence in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[1] Herring raises the following multiple issues that could have been raised on appeal: (1) the trial court erroneously applied two statutory aggravating circumstances; (2) the trial court impermissibly counted both the cold, calculated, and premeditated and the elimination of witness aggravating circumstances; (3) the trial judge applied a nonstatutory aggravating factor in sentencing Herring to death; (4) Herring's probation officer should not have been allowed to testify concerning Herring's comment about the victim; (5) the death penalty jury instructions were constitutionally inadequate; (6) the trial judge failed to consider the death sentence's proportionality; (7) the trial court erroneously excluded Herring's proffered mitigating evidence; (8) the trial court applied an incorrect sentencing standard; (9) during the sentencing phase closing arguments, the prosecutor improperly suggested that Herring might be granted parole if given life imprisonment; (10) excluding a prospective juror for cause because of his death penalty views violated the sixth and fourteenth amendments; (11) the state did not prove Herring knowingly and intelligently waived his privilege against self-incrimination and his right to appeal; and, finally, (12) the

trial judge erred by abandoning his duty to review the jury's recommended sentence. We reject all these contentions as improper for a 3.850 motion. As we have previously stated, a 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal. *Sireci v. State*, 469 So.2d 119 (Fla.1985), *cert. denied*, --- U.S. ----, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986); *Jones v. State*, 446 So.2d 1059 (Fla.1984); *Demps v. State*, 416 So.2d 808 (Fla.1982).

[2] Appellant next claims that his sentence is not proportionate, and that *Caruthers v. State,* 465 So.2d 496 (Fla.1985), decided after we affirmed the initial appeal in this case, mandates a life sentence. The state responds that a prior case is not reviewable in light of a subsequent decision, citing *Tafero v. State*, 459 So.2d 1034 (Fla.1984), and *Sullivan v. State*, 441 So.2d 609 (Fla.1983). We do not reach that issue because there are clear distinguishing characteristics between *Caruthers* and *Herring*. Caruthers had no significant history of prior criminal activity, and the sentencing proceeding considered other nonstatutory mitigating factors. Herring, however, had a prior robbery conviction. Additionally, there was evidence that Herring killed the victim to eliminate him as a witness. We hold that Herring's contention on this issue is without merit.

[3] In his next point, Herring contends that an evidentiary hearing was necessary to decide his ineffective-assistance-of-counsel claims. The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla.1981). We agree with the trial judge's findings and commend him for his detailed explanation.

Finally, we reject Herring's claim that our capital sentencing statute is discriminatorily applied. We have rejected this claim in multiple decisions. *Smith v. State*, 457 So.2d 1380 (Fla.1984); *Adams v. State*, 449 So.2d 819 (Fla.1984).

For the reasons expressed, we affirm the trial court's denial of relief.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur.